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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 287

REMINGTON RAND, INC.,
Petitioner
v. (Defendant Below) Action No. 3978

ISABEL DYSART BUSH, DOROTHY DYSART FELLERS and SAMUEL CLAYTON DYSART,
Respondents
(Plaintiffs Below)

REMINGTON RAND, INC.,
Petitioner
v. (Defendant Below) Action No. 3979

ISABEL DYSART BUSH, Administratrix d.b.n., c.t.a. of the Estate of Birney Dysart, Deceased,
Respondent
(Plaintiff Below)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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Dated: September 28, 1954.

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Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported at 213 F. (2d) 456. The pertinent provision of the opinion of the District Court, which was rendered July 10, 1951 (R. 790), is not reported. Both opinions are set out in the Appendix attached to the Petition (pp. 23-45).

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

As to Action No. 3978

1. Where, as here, after the rendition of an interlocutory judgment determining the substantive rights of the parties under Connecticut law and establishing defendant's liability, one of four plaintiffs dies during the accounting proceedings, but within two years of her death—the time allowed for substitution under Rule 25(a)(1)—all her interest in and to the claim vested under State law in the three surviving plaintiffs, who then became the sole real parties in interest, does Rule 25(a)(1) require a dismissal?

As to Action No. 3979

2. Where, as here, after the rendition of such an interlocutory judgment the executrix-plaintiff of her husband's estate and sole legatee thereof died, but within two years of her death all her beneficial right, title and interest in and to the claim vested under State law

in the three surviving plaintiffs in the other action No. 3978 (consolidated with No. 3979), who then became the beneficial real parties in interest, and after the two-year period but prior to final judgment a personal representative of the husband's estate is added for the sole purpose of settling the estate's tax liability growing out of this litigation, does Rule 25(a)(1) require a dismissal?

As to both Actions No. 3978 and No. 3979

3. Under the circumstances stated above, does Rule 25(a)(1) divest the District Court of jurisdiction in either action when Rule 82 provides and this Court has repeatedly held that the federal "rules shall not be construed to extend or limit the jurisdiction of the United States district courts"?

4. Under the circumstances stated above and where Petitioner has waived or is estopped to claim error, if any, and makes no claim that it was prejudiced by the failure to make substitution, do not 28 U. S. C. § 2111 and related principles of harmless error preclude this Court from reversing either judgment that has been rendered on the merits?

5. Under the circumstances just stated, is this Court not precluded from reversing either judgment by 28 U. S. C. § 2105, which forbids a reversal for error in ruling upon matters in abatement that do not involve jurisdiction,

> where there was and is federal jurisdiction of the consolidated actions on the sole basis of diversity, and, if there is now a reversal of any of the present judgments, a new action or actions can be brought forthwith by the same surviving plaintiffs, now before the Court, against the same defendant in

the same District Court or in the State Court on the same claims that are presently in judgment?

6. Where jurisdiction is based solely on diversity, does Federal Rule 25(a)(1), regardless of other rules and statutes, regardless of the merits, and notwithstanding waiver and estoppel by defendant and lack of prejudice to the defendant, peremptorily require a dismissal of either or both actions, where such dismissal is not warranted by State law?

Statutes And Federal Rules Involved

Federal Rules *25(a)(1),* involving substitution upon death of a party, *21,* involving misjoinder and non-joinder of parties, and *6(b),* involving enlargement of time, are set forth in the Petition (pp. 3-4).

Other pertinent statutes and Federal Rules involved are:

Non-Jurisdictional Character Of Rules

Rule 82. Jurisdiction and Venue Unaffected.

"These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."

Transfer Of, And Real Parties In Interest

Rule 25. Substitution of parties.

(a) Death.

"(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action

does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties."

(c) Transfer of interest.

"In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule."

Rule 17. Parties Plaintiff and Defendant; Capacity.

(a) Real party in interest.

"Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States."

Harmless Error

28 U. S. C. § 2111. Harmless error.

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

Rule 61. Harmless error.

"No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment, or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

Rule 1. Scope of rules.

". . . They [the Federal Rules] shall be construed to secure the just, speedy, and inexpensive determination of every action."
(The complete text of Rule 1 is set out in the appendix.)

Abatement

28 U. S. C. § 2105. Scope of review; abatement.

"There shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction."

Conn. Gen. Statutes § 8332 (Rev. 1949). Accidental failure of suit; when new action is allowable.

"If any action, commenced within the time limited by law, shall have failed one or more times to be tried on its merits because . . . the writ was abated . . . or the action shall have been otherwise avoided or defeated by the death of a party or for any matter of form; . . . the plaintiff, or, if the plaintiff be dead and the action by law survive, his

executor or administrator, may commence a new action for the same cause at any time *within one year after the determination of the original action or after the reversal of the judgment.* . . . The provisions of this section shall apply . . . to any action brought to the United States circuit or district court for the district of Connecticut . . ." (Emphasis supplied.) (The complete text of Section 8332 is set out in the appendix.)

Conn. Gen. Statutes § 8337 (Rev. 1949). Survival of actions and causes of actions.

"No cause or right of action shall be lost or destroyed by the death of any person, but it shall survive in favor of or against the executor or administrator of such deceased person. No civil action or proceeding shall abate by reason of the death of any party thereto, but it may be continued by or against the executor or administrator of such decedent. In case of the death of any party plaintiff, his executor or administrator may enter within six months thereafter and prosecute the suit in the same manner as his testator or intestate might have done if he had lived; . . ." (The complete text of Section 8337 is set out in the appendix.)

Conn. Gen. Statutes § 8339 (Rev. 1949). Entry by successor of deceased executor or administrator.

"In any action by or against an executor or administrator, as such, in case of his death, his successor in office may enter and prosecute, or be cited in to defend it."

Conn. Gen. Statutes § 7041 (Rev. 1949). Removal, resignation or death of fiduciary, and appointment of successor.

". . . Upon the death, removal or acceptance of the resignation of any such person before the com-

pletion of his duties, such court of probate may appoint a suitable person to fill the vacancy caused thereby, who shall give a probate bond, and all suits in favor of or against any such person shall survive to and may be prosecuted by or against the person appointed to succeed him. . . ." (The complete text of Section 7041 is set out in the appendix.)

Conn. Gen. Statutes § 7056 (Rev. 1949). Court to ascertain heirs and distributees.

"The court of probate shall ascertain the heirs and distributees of each intestate estate, *and of each testate estate so far as the will may leave the same indefinite and necessary to be defined;* and such court shall order the administrator or other fiduciary charged with the administration of the estate to deliver possession of or pay over the same to the person or persons entitled thereto in the proportions provided by law, or, in case distributors are appointed or a mutual distribution is filed, as provided in section 7057, in accordance with the division made by such distributors or mutual distribution, taking proper receipts therefor." (Emphasis supplied.)

Statement

The two actions below, No. 3978 and No. 3979, were based on a contract to recover reasonable compensation for use by defendant, now Petitioner, Remington Rand, Inc., of an automatic credit balance device which was invented by Birney Dysart on or about December 25, 1919 and on which he applied for a patent.

Birney Dysart died July 20, 1932 before the issuance of a patent on said device, for the use of which the defendant has been adjudged liable. (R. 565, 1125) His heirs at law were his widow, Eva Perin Dysart, and their

three children, Isabel D. Bush, Dorothy D. Fellers and Samuel C. Dysart. Birney Dysart, however, died testate. His estate was probated in the Probate Court for the District of Hartford, Connecticut; his widow, Eva Perin Dysart, was appointed executrix; she was the sole legatee and distributee under the will. (R. 576, 661) The final administration account of Eva Perin Dysart as executrix was accepted by the Probate Court on March 28, 1933. (R. 576, 792) The Probate Court then found "that all claims duly presented within the time limited by the Court have either been paid, settled or barred by law". (R. 661) And thereafter, by decree of the Probate Court, all the estate of Birney Dysart was formally distributed, on August 8, 1933, to the sole legatee and distributee, Eva Perin Dysart. (R. 661, 662)

Letters patent under the Birney Dysart application, issued to Eva Perin Dysart, in her own right, on or about September 17, 1935. (R. 4093)

On or about July 25, 1936 she transferred to each of the three children, mentioned above, a one-quarter interest in and to the claim against Remington Rand, Inc., for the reasonable value of the use of the invention from the date of the transfer from Dysart's estate on August 8, 1933, together with a one-quarter interest in and to the patent. (Judge Clark's Finding 15, R. 104; opinion of District Judge Smith, R. 797, and Court of Appeals, Appendix to Petition, p. 32; 213 F. (2d) 456, at 463)

The potential tax liability of the Birney Dysart estate to the United States and to Connecticut, in the event of recovery against Remington Rand necessitated a division of the litigation on behalf of Eva Perin Dysart and her children into two parts. (R. 1162)

In 1937, two civil actions, No. 3978 and No. 3979, were instituted in the Superior Court of Connecticut against Remington Rand, Inc. (R. 10, 25) In No. 3978, the plain-

tiffs were Eva Perin Dysart, suing as an individual, and her three children, Isabel D. Bush, Dorothy D. Fellers and Samuel C. Dysart. Recovery was sought for breach of the contract to pay the reasonable value of the use of the invention from August 8, 1933, the time of the distribution of the estate of Birney Dysart. (R. 10) In No. 3979, the plaintiff was Eva Perin Dysart, suing as executrix of the estate of Birney Dysart. Recovery was sought for breach of the contract during the period prior to August 8, 1933. (R. 25)

These actions were removed by the defendant to the United States District Court for Connecticut on the sole basis of diversity of citizenship. (R. 22, 39)

After removal, the two actions were consolidated for trial because of common questions of law and fact. (R. 95)

On July 18, 1941, Circuit Judge Clark, sitting as district judge, rendered an interlocutory judgment establishing liability of the defendant in favor of the plaintiffs in No. 3978 and the plaintiff in No. 3979, and ordering the defendant to account. (R. 113) He adjudged that the Birney Dysart estate (action No. 3979) "is entitled to all sums accruing to Dysart before his death" (R. 104); and the plaintiffs in No. 3978 are entitled to all sums subsequently accruing in equal shares. (R. 104; 40 F. Supp. 599)

The consolidated case was referred to a master on October 2, 1941. Preliminary hearings, largely of a procedural nature for the assembly of necessary data and evidence, were held before the master on October 24, 1941; July 13, 1942; July 9, 1943; June 2, 1944; December 10, 1945; and February 14, 1946. (R. 122) Respondents (plaintiffs) never consented to delay because of World War II, as stated in the defendant's Petition (p. 5).

Eva Perin Dysart died December 30, 1945, approxi-

mately 4-1/2 years after the interlocutory judgment, *supra;* and about three years before the beginning of the hearings on the merits before the master, subsequently referred to. (R. 565)

The defendant had knowledge of Mrs. Dysart's death in the early part of 1946, shortly after the death occurred. (District Court Finding 17, R. 794; Court of Appeals opinion, Appendix to Petition, p. 33; 213 F. (2d) 463-464)

The estate of Eva Perin Dysart was fully settled and distributed to her three children above named, the remaining plaintiffs in this consolidated action, by Certificate of Mutual Distribution filed and accepted on March 27, 1947, by the Probate Court; and the tax liability to the United States and to the State of Connecticut was fully settled and paid. (R. 793, 794; Appendix to Petition, p. 32)

All of this occurred within two years—the time required for substitution under Rule 25(a)(1)—of the death of Eva Perin Dysart. (R. 608, 720)

Hearings on the merits before the Master with full production of evidence commenced on January 11, 1949, and continued on January 12, 13, 1949. On the fourth hearing day, January 19, 1949, the death of Eva Perin Dysart was suggested on the record. (R. 2174) Hearings thereafter continued and were had on April 12, 13, 14, 19, 20 and 21, May 17, 18, 19, 24, 25, 26 and 27, and June 8, 9, 10, 14, 15, 16 and 17, 1949. (R. 123)

Thereafter, on July 25, 1949, in its original brief, the defendant first raised the objection that no substitution had been made for Eva Perin Dysart, who had died December 30, 1945, approximately three and one-half years previously. (R. 124, 200) The Master overruled the objection. (R. 211)

The Probate Court appointed Isabel D. Bush admin-

istratrix d. b. n., c. t. a. of the estate of Birney Dysart on August 16, 1949. (R. 666) The Birney Dysart estate having been previously distributed and all claims having been discharged, other than the tax claims growing out of action No. 3979 (*supra*, p. 9), this appointment was for the sole purpose of liquidating the potential tax liability of the estate of Birney Dysart to the United States and to the State of Connecticut. (R. 594, 1162)

On January 31, 1950, defendant moved under Federal Rule 25 to dismiss the individual claim of Eva Perin Dysart in action No. 3978 and her claim as executrix in action No. 3979, on the ground that substitution had not been made within two years of her death. (R. 274) Defendant did not ask the Court to dismiss the claims of the three plaintiff children in action No. 3978. (R. 274)

Not until June 11, 1951 did defendant move for a dismissal of action No. 3978, in its entirety, i.e., the individual claims of the plaintiff children as well as the individual claim of Eva Perin Dysart. It also then moved for dismissal of action No. 3979.

Defendant never raised any objection that the three plaintiff children and Eva Perin Dysart, as an individual, were not the real parties in interest in action No. 3978, either in its pleadings (R. 66-72) or during the trial on the merits as to liability before Judge Clark in 1941, or during the long accounting proceedings before the Master. This objection was made for the first time in its motion of June 11, 1951—almost 14 years after the institution of the actions—and represents a complete reversal of its position unequivocally taken in June, 1941. At that time, defendant argued that the claim in litigation had been fully distributed out of the estate of Birney Dysart; that Eva Perin Dysart as his executrix had no right to maintain action No. 3979; and that the entire claim was in Eva Perin Dysart and her three plaintiff children in

action No. 3978. (Brief of defendant to District Court, June 23, 1941, p. 75*) (See p. 24 *infra*)

Petitioner's argument under its Point IV (Petition, pp. 18-22) is in support of the objection first made as noted above in its motion of June 11, 1951, and in repudiation of its opposite position maintained throughout the preceding 14 years.

On July 12, 1951, Judge Smith denied defendant's motion; and granted plaintiffs' motion to add Isabel D. Bush, administratrix d. b. n., c. t. a. of the estate of Birney Dysart, as a party plaintiff. (R. 800, 802)

On July 22, 1952, Judge Smith rendered final judgments against the defendant and in favor of the respective plaintiffs in the following amounts (R. 1125; Appendix to Petition, p. 26):

Action No. 3978

Isabel D. Bush .....$359,094.56; execution to issue
Dorothy D. Fellers .... $359,094.56; execution to issue
Samuel C. Dysart ..... $359,094.56; execution to issue

Action No. 3979

Isabel D. Bush, as
administratrix d.b.n.
c.t.a. of the estate
of Birney Dysart ..... $142,717.91; execution to issue

On May 25, 1954, the Court of Appeals for the Second Circuit unanimously affirmed the above judgments of the District Court. (Appendix to Petition, pp. 23-37)

*By stipulation of counsel filed in the Court of Appeals, dated October 15, 1953, excerpt quotes may be made from the briefs of the parties filed in the District Court, without certification of the briefs.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

There is no substantial jurisdictional question for review. The applicability of Rule 25(a)(1) does not involve jurisdiction in light of the clear provisions of Rule 82 and the decisions of this Court that Federal Rules do not affect jurisdiction.

Petitioner makes no contention that the merits, which involve only State substantive rights, have been improperly adjudged. It presents only a question of federal procedure involving substitution; and makes no contention that failure to substitute prejudiced it. Error, if any, was harmless; and did not involve jurisdiction. If any of the actions are now abated, a new action can be forthwith brought, and under Connecticut law the defendant cannot successfully plead the statute of limitations. Petitioner can gain only delay.

Since reversal by this Court of these judgments is barred by 28 U. S. C. § 2111 and § 2105, on harmless error and abatement, the grant of certiorari would serve no useful purpose.

Further, there is no question for review in action No. 3978. Substitution was unnecessary, for within two years of the death of one of the four plaintiffs, all her interest vested in the three remaining plaintiffs.

And there is no substantial question for review in action No. 3979. Both of the lower Courts have found waiver and estoppel because of defendant's delay, to plaintiffs' prejudice, in raising the technical objection of non-substitution.

Moreover, within two years after the death of the executrix, all beneficial interest vested and all parties entitled to share in the recovery were and are before the Court. Petitioner has no valid interest as to how the proceeds of a recovery against it shall be divided.

The decisions below correctly applied the Federal Rules to the facts of this case; and they are not in conflict with the decisions of this Court.

Because of its facts, action No. 3979 is not a proper vehicle for general exposition by this Court of the scope and validity of Rule 25(a)(1) for the guidance of the Federal Bar and the governance of the Federal Courts. Furthermore, the proposed amendment to Rule 25(a)(1), discussed on page 10 of the Petition, may render any present construction of Rule 25(a)(1) of short-lived duration.

After 17 years of litigation, judgments on the merits in both actions have been affirmed by the Second Circuit. The Circuit stated:

> "The defendant has made devious and strenuous efforts to avoid this claim."*

Its Petition for Certiorari is another such effort.

There is no special and important reason, within the intendment of this Court's Rule 19 (1), to warrant the grant of certiorari; and this Court, in the exercise of a sound judicial discretion, should deny certiorari in both action No. 3978 and No. 3979.

SUMMARY OF ARGUMENT

I

Action No. 3978

There is no question for review in action No. 3978.

Eva Perin Dysart and her three children were the original parties plaintiff in this action for damages accruing after the distribution of the Birney Dysart estate.

*Appendix to Petition, bottom p. 36.

Eva Perin Dysart's estate having been fully distributed within the time allowed for substitution, all her interest, both legal and equitable, vested in the three surviving plaintiff children. Both lower courts have found that substitution thereupon became unnecessary.

Petitioner raises no substantial question as to the applicability of Rule 25(a)(1) in action No. 3978.

Petitioner now asserts that the four original plaintiffs had no interest under Connecticut law in the claim in action No. 3978 when that action was instituted; that both of the lower courts erred in holding Connecticut law to be otherwise; and that a dismissal of No. 3978 must follow a dismissal of action No. 3979.

This theory is a very belated afterthought, first advanced on June 11, 1951, and is diametrically opposed to Petitioner's position taken ten years before in 1941, to the effect that the plaintiffs in No. 3978 were possessed of the only enforceable claim. And it is also inconsistent with the position taken as late as January, 1950, when, in reference to No. 3978, it sought dismissal only as to the claim of Eva Perin Dysart.

Petitioner's belated theory is frivolous and without merit. The original plaintiffs in No. 3978 were the real parties in interest under Rule 17(a) and Connecticut law. Judge Clark and Judge Smith, both trained in Connecticut law, so found; and the Second Circuit affirmed. This Court will not grant certiorari to review such concurrent findings of the lower courts.

Further, the grant of certiorari would not settle an important question of Federal law, i.e., the meaning and application and reconciliation of Federal Rules 25(a)(1), 21 and 6(b), for which Petitioner seeks certiorari in its "Questions Presented" and in its "Reasons for Granting the Writ". (Petition pp. 2-3, 7-8)

II

Action No. 3979

There is no substantial question for review in action No. 3979.

Eva Perin Dysart, as executrix of the estate of Birney Dysart, was the original plaintiff in this action to recover damages accruing prior to the distribution of the Birney Dysart estate.

She subsequently died and within the time allowed for substitution, her estate was fully distributed, as stated above. Since she was the sole legatee and distributee of the Birney Dysart estate, the plaintiff children in No. 3978 became the beneficial real parties in interest in No. 3979. And since they were before the Court in the consolidated case, it was only necessary to add a party to represent the bare legal title for the purpose of settling the tax liability growing out of the litigation of action No. 3979. This was done by adding one of the children as administratrix d.b.n., c.t.a. in No. 3979.

This action was thoroughly consistent with *Anderson v. Yungkau* (1947) 329 U. S. 482, which involved the enforcement of a federal right and held that plaintiff's failure to revive the suit *against* the executor of the deceased defendant within the two-year period of Rule 25(a)(1) necessitated the dismissal of the action. The rule period was in the nature of a statute of limitations and operated for the protection and repose of the estate.

In the diversity case at bar, Rule 25(a)(1) is being invoked by the Petitioner against the estate despite waiver and estoppel, and to destroy the rights of plaintiff estate under the substantive law of Connecticut, in violation of both the Rule-Making Statute (28 U. S. C. § 2072) and the principles of *Erie-Tompkins*. And to what avail? In-

terminable delay in the closing of the estate. Defendant gains nothing else. Under Connecticut law, a new action on behalf of the estate could be brought forthwith against the defendant; and the statute of limitations would not apply.

Judicial economy forbids such repetitious folly.

III

Action No. 3978 and Action No. 3979

No jurisdictional question warrants review in either action No. 3978 or No. 3979.

In *Anderson v. Yungkau,* this Court stated that "Rule 25(a)(1) operates both as a statute of limitations upon revivor and as a mandate to the Court to dismiss an action not revived within a two-year period."

Relying upon *Anderson v. Yungkau,* Petitioner asks this Court to construe Rule 25(a)(1) as jurisdictional. This construction is inadmissible:

> Federal Rule 82 states that "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts . . .".
>
> Decisions of this Court are in accord with that principle.
>
> *Yungkau* did not give any jurisdictional effect to Rule 25(a)(1). It construed the rule as a statute of limitations not subject to enlargement by the District Court.

IV

Action No. 3978 and Action No. 3979

Error, if any, of the District Court in refusing to dismiss action No. 3978 or action No. 3979 for failure to

substitute a party in lieu of Eva Perin Dysart is harmless. All the parties having an interest in the recovery are before the Court, and *Petitioner makes no claim of prejudice.*

Since this Court, if it grants certiorari, is required by 28 U. S. C. § 2111 and related principles to disregard harmless error, a review in neither case will serve a useful purpose.

The District Court's refusal to dismiss either action is not reversible for an additional reason. Its ruling involves matter in abatement of a non-jurisdictional character and 28 U. S. C. § 2105 forbids reversal both by the Court of Appeals and by the Supreme Court.

On next November 12, 1954, these cases will have been in litigation for 17 years. At long last, judgments on the merits in the two actions, No. 3978 and No. 3979, have been rendered by the District Court and affirmed by the Second Circuit.

Petitioner makes no claim of error as to the merits, nor any claim of prejudice. It has had not only its day in court but has had almost a generation. That should suffice.

ARGUMENT

POINT I

Action No. 3978

THE ACTION OF THE DISTRICT COURT AND THE COURT OF APPEALS IN REFUSING TO DISMISS NO. 3978 IS THOROUGHLY CONSISTENT WITH *ANDERSON v. YUNGKAU.*

A. Substitution was not required by Rule 25(a) (1) nor by *Anderson v. Yungkau* where, *within* two years of the death of one of four plaintiffs, all her interest vested in the three surviving plaintiffs, who then became the sole real parties in interest.

Anderson v. Yungkau dealt with an entirely dissimilar state of facts. It held that an action could not be revived against the estate of a deceased defendant *more* than two years after the death of the defendant. It says nothing, however, as to any requirement of substitution under Rule 25(a)(1), where, as here, the interest of a deceased plaintiff passed *within* two years to the surviving plaintiffs who became the only parties in interest. (See discussion Point II, *infra.*)

Eva Perin Dysart died December 30, 1945. Within the period allowed for substitution, her estate was fully distributed to the three surviving plaintiff children on March 27, 1947. Thereupon, as both the District Court and the Court of Appeals found, the children, already parties plaintiff in action No. 3978, acquired full legal title to the estate of their mother, and both courts found substitution unnecessary. Indeed, after March 27, 1947, it would have been impossible to substitute a party in No. 3978 in lieu of Eva Perin Dysart, because her estate no longer had any interest in the litigation.

Petitioner nowhere questions the above conclusions.

B. The question raised in Petitioner's Point IV—that the *original* plaintiffs did not have an enforceable claim when suit was instituted—is not pertinent to a construction of Rule 25(a) (1) and hence is not properly before this Court.

Petitioner seeks to circumvent the conclusions in Point I A *supra,* by contending that the four original plaintiffs in action No. 3978, Eva Perin Dysart and her three chil-

dren, do not have an enforceable claim; that the only enforceable claim is in the Birney Dysart estate in action No. 3979; and that if No. 3979 is dismissed for failure to make substitution pursuant to Rule 25(a)(1), then a dismissal of No. 3978 must follow.

The question raised in Point IV is not properly before this Court. It is not included in Petitioner's "Questions Presented", which concern solely the applicability of Rule 25(a)(1) and its relationship to Rule 21 on addition of parties and Rule 6(b) on enlargement of time. (Petition, pp. 2-3) Nor is it included in its general reason for granting the writ (pp. 7-8), where Petitioner states:

> "This case presents an important question of federal law, i.e., the meaning and applicability and reconciliation of three Federal Rules of Civil Procedure [Rule 25 (a)(1), Rule 21 and Rule 6(b)] promulgated for the guidance of the federal bar and the governance of the federal courts."

But there is no problem in No. 3978 of adding parties under Rule 21 or enlarging the time period of Rule 25(a)(1) by resort to Rule 6(b). And Petitioner's Point IV is predicated on the unrelated proposition that the lower courts "decided an important state question", to wit, whether plaintiffs in No. 3978 have an enforceable claim "in a way in conflict with applicable state law" (Petition, p. 18).

Judge Clark and Judge Smith, both trained in Connecticut law, found that there had been an effective transfer of the claim to the original plaintiffs in No. 3978 prior to the institution of that action; and that the original plaintiffs were the real parties in interest to sue upon that claim. The Second Circuit affirmed. (See C (1) *infra*)

The grant of certiorari to review such concurrent findings of the lower courts would not serve a useful purpose

since, under the established rule, this Court normally accepts concurrent findings of federal courts, except where constitutional or other important public questions hinge upon factual determinations. See 5 Moore's Federal Practice (2d ed.) par. 52.12. There are no such questions in this case, which involves *only* the enforcement of state substantive rights.

As this Court stated in *Graver Tank & Mfg. Co. v. Linde Air Products Co.* (1949) 336 U.S. 271, 275:

> "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

C. Petitioner's Point IV lacks merit.

(1) *Both lower courts have found that the plaintiffs in No. 3978 have an enforceable claim.*

Judge Charles E. Clark, sitting as a district judge so found, 40 F. Supp. 596, 599.

District Judge Smith reaffirmed that position. He stated:

> "We cannot uphold defendant's contention that the claim under the implied contract was in its entirety personal to Birney Dysart and that the right to compensation accruing subsequent to Dysart's death did not pass under his will. In fact, Judge Clark specifically found otherwise: 'All rights in the invention and the patent and all claims for use thereof after Dysart's death vested in her (Mrs. Dysart) as sole legatee under her husband's will and have been so distributed pursuant to appropriate probate decrees', 40 F. Supp. 596, 599. Nothing has been presented during the course of these proceedings, to incline the Court to alter its previous finding on this point. It follows that the assignment of the ¼th interest in the claim to each

of the three Dysart children was an effective transfer."

The Second Circuit affirmed that finding, pointing out that Eva Perin Dysart was sole legatee and that "in 1935* she had transferred a three-quarter interest in equal parts to her three children who were also plaintiffs in the second action". (Appendix to Petition, p. 32)

Petitioner's argument that there can be no distribution of non-inventoried assets under Connecticut law, and hence that the original plaintiffs in No. 3978 have no enforceable claim, was rejected by both the District Court and the Court of Appeals. The position of the lower courts is sustained by the following Connecticut cases determining Connecticut probate law:— *Parlato v. McCarthy,* 136 Conn. 126 (1949); *Lynch v. Skelly,* 138 Conn. 376 (1951); *Woodhouse v. Phelps,* 51 Conn. 521 (1884); *Bishop v. Groton Savings Bank,* 96 Conn. 325 (1921); 2 Locke & Kohn, Conn. Probate Practice, Sec. 596, pp. 738-739.

Bankers Trust Co. v. Greims, 110 Conn. 36 (1929), the sole Connecticut case upon which Petitioner relies in support of its proposition is readily distinguishable. That case dealt with distributors appointed by the probate court in an *intestate* estate and the court there held that the duties of such distributors were statutory and ministerial; and that they were without authority to distribute any property of the estate which had not come into their hands or had not been inventoried, where such property consisted of *realty* situated outside of Connecticut. That case has no application to a *testate* estate, as in the instant case, where all the rest, residue and remainder consisting solely

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*Sic; should be 1936, p. 9, *supra.* The difference in date, 1935 or 1936, is, however, unimportant, since in either event the transfer occurred prior to the institution of action No. 3978 on November 17, 1937 (R 14).

of *personalty* is left to the surviving widow as the sole legatee. In this situation, there is no need for the appointment of distributors and the beneficial title to all personalty vests in the heirs upon the death of the decedent. The Connecticut statute so provides, and the cases cited above so hold. (See Sec. 7056, Conn. General Statutes (Rev. 1949); *Cole v. Jerman,* 77 Conn. 374 (1904); *State ex rel. Lynch v. Whitehouse,* 75 Conn. 410 (1903); 2 Locke & Kohn, Conn. Probate Practice, Secs. 598, 599, pp. 742-7.)

Even assuming arguendo that both the lower courts erred, the error is not of such an exceptional character as to warrant review by this Court (see Point I B, *supra,* p. 20); and especially where it is not pertinent to a construction of Rule 25(a)(1).

(2) *Petitioner's present position is the exact reverse of the position it maintained from the institution of the suit in 1937 down to June 11, 1951.*

Defendant (Petitioner) in its pleadings never objected that the claim in action No. 3978 was not vested in the three plaintiff children and Eva Perin Dysart, as an individual, as the real parties in interest. On the contrary, following the trial before Judge Clark as to the substantive rights of the parties, defendant in its brief on June 23, 1941 asserted that Eva Perin Dysart, as executrix, did not have an enforceable claim in No. 3979 and that the only enforceable claim was vested in the plaintiffs in No. 3978. Counsel stated in its brief*:

> "An examination of the record (pages 22-25) shows that Mrs. Dysart as Executrix transferred to herself and the other heirs all right, etc., which she as Executrix had in various patents including

*See footnote, p. 13, *supra.*

the one in question. As soon as she had done this (even if there were other items in the estate which were not yet distributed) *she lost the right to sue as this passed to the distributees.*

"It will be noted that both suits are identical excepting only the portions relating to the description of the plaintiffs. If the Executrix had not given all her right and title in the patent to the distributees they could not sue. But they have sued relying on the title they got from her and certainly the law does not permit the same estate to sue for the same thing twice—*once by the Executrix (particularly after she had transferred all her interest in the res) and once by the distributees.*

"We respectfully claim that our motion to dismiss the suit of the executrix should be granted." (Emphasis supplied)

Subsequently and during the long accounting proceedings before the Master, defendant did not change that position.

In its August 24, 1949 brief* (p. 48) to the Special Master after the accounting had been concluded when defendant raised the question of lack of substitution and objected to the claim of Eva Perin Dysart, as executrix, in No. 3979, and to the claim of Eva Perin Dysart, as an individual, in No. 3978, it expressly stated:

> "We contend that the action must be dismissed except for the one-fourth interest of each of the three existing co-plaintiffs, from 1936 to date."

And it adhered to that position as late as January 31, 1950 when it moved (R. 274) to dismiss, for non-substitution, the claim of Eva Perin Dysart, as executrix (action No. 3979) and the claim of Eva Perin Dysart, as an individual, in action No. 3978. *Defendant did not ask the*

*See footnote, p. 13, *supra.*

Court to dismiss the claims of the three plaintiff children in No. 3978.

It was not until June 11, 1951 (R. 620)—almost 14 years after the institution of No. 3978—that defendant completely reversed its position and adopted the present position which it now asserts in Point IV.

Settled law does not permit a party to reverse his position during litigation to the prejudice of the opposing party.

(3) *Petitioner's objection is frivolous and not timely.*

It is clear that Petitioner's present position set forth in its Point IV results from a belated afterthought and is frivolous.

> "Objections to parties are generally matters of a dilatory nature in abatement of the action and must be seasonably made having regard to the nature of the action . . .; to the alleged defect, whether a want of capacity or interest, a nonjoinder or misjoinder of parties . . . and unless so made are ordinarily to be deemed waived."
>
> 39 Am. Jur. Parties Sec. 104, p. 975; *McCandless v. Furlaud* (1934) 293 U. S. 67; *Merwin v. Richardson,* 52 Conn. 223 (1884)

(4) *Petitioner has no valid interest or concern as to how the proceeds of a recovery against it shall be divided.*

By the distribution of Birney Dysart's estate, and the subsequent assignment by Eva Perin Dysart of a ¼th interest to each of the three children in and to the contract claim and the patent, as well, individual interests in and to the chose in action on the contract were created. (Point I C (1), *supra*)

Under Connecticut law, by virtue of the wills of Bir-

ney Dysart and Eva Perin Dysart and the distribution of their estates, all interest, both legal and equitable, in action No. 3978 vested in the three surviving plaintiff children. (Point I A, and C (1), *supra,* pp. 20, 22.)

And for the same reasons all beneficial interest in action No. 3979 vested in those same plaintiff children; and the administratrix d.b.n., c.t.a. in No. 3979 has only a bare legal title to take the recoverable proceeds in this action, liquidate the estate's tax liability growing out of this litigation, and then pay over the residue to the plaintiff children. (Point II C, *infra,* p. 37.)

Petitioner makes no contention that there is any error as to the amounts of the judgments in actions No. 3978 and No. 3979.

To paraphrase this Court in *Greene County v. Thomas, Ex'r.,* 211 U. S. 598, 602 (1909), the defendant in the case at bar owes the amount adjudged as the reasonable compensation for the contractual use of Birney Dysart's invention. It has no interest or concern in the proper division of the amounts adjudged to be due and owing by the defendant.

POINT II

Action No. 3979

THE ACTION OF THE DISTRICT COURT AND THE COURT OF APPEALS IN REFUSING TO DISMISS NO. 3979 IS THOROUGHLY CONSISTENT WITH *ANDERSON v. YUNGKAU.*

Action No. 3979 is the suit by Eva Perin Dysart, as executrix of the estate of Birney Dysart, to recover damages up to the date of distribution of Birney Dysart's estate; i.e., for the period prior to that covered in action No. 3978.

Although all claims of creditors had been paid and the

estate of Birney Dysart distributed to Eva Perin Dysart in 1933 as sole legatee, the potential tax liability of the estate to the United States and the State of Connecticut had not been liquidated and this necessitated a division of the litigation into two actions, No. 3978, *supra,* and No. 3979, under discussion.

During the lifetime of Eva Perin Dysart, an interlocutory judgment was rendered in 1941 determining the substantive rights of the parties and establishing the liability of the defendant in favor of her as plaintiff-executrix. This disposed of all questions except the amount due.

After Eva Perin Dysart's death and *within* two years thereof, her estate was distributed (March 27, 1947). At that time her three children, co-plaintiffs in No. 3978, who became the sole real parties in interest of both the legal and equitable title to the claim in No. 3978, also then became the sole real parties in interest of the beneficial title to the claim in No. 3979. The plaintiff children were at that time, to wit, March 27, 1947, before the Court in the consolidated case as they had been from the institution of the litigation.

Since the proceeds of any judgment to be rendered in No. 3979, after liquidating the tax liability to the United States and to Connecticut, must be paid over to the plaintiff children, it was necessary only to add a party to accomplish this purpose. This was done when Isabel D. Bush, one of the plaintiff children, was added as administratrix d.b.n., c.t.a. in No. 3979.

Although defendant could have objected to the failure to substitute for Eva Perin Dysart, executrix, immediately after December 30, 1947, defendant delayed in making its technical objection of non-substitution until after the conclusion of the long and costly accounting proceedings, to the prejudice of plaintiffs.

A. Rule 25(a) (1) is not jurisdictional; as construed in *Yungkau*, a case involving a federal matter, it operates as a statute of limitations for the protection of an estate.

Yungkau did not construe Rule 25(a)(1) as jurisdictional; and sound principles forbid such a construction. (See Point III, *infra*, p. 44.)

Yungkau construed the rule as operating "as a statute of limitations" and "as a mandate to the Court to dismiss" for the protection and repose of an estate. Petitioner, however, would have this Court apply *Yungkau* to defeat the plaintiff estate and interminably delay its settlement.

As the Court noted, *Yungkau* involved a *federal* matter (see its footnote 4, 329 U.S. 482, at p. 485); and a reconciliation of Rule 25(a) and Rule 6(b) (329 U.S. at p. 484). The case did not involve a reconciliation of Rule 21 on the addition of parties with Rules 25(a) and 6(b).

It involved a suit by a receiver of a national bank to recover stock assessments. The Court affirmed the dismissal of the action by the lower courts because of plaintiff's failure to revive the suit against the executor of a deceased defendant within two years of the latter's death.

In *Yungkau*, this Court stated in reference to 28 U.S.C. § 778 (1940), upon which Rule 25(a) is partially based:

> *"That statute, like other statutes of limitations, was a statute of repose.* It was designed to keep short the time within which actions might be revived so that the closing and distribution of estates might not be interminably delayed. That policy is reflected in Rule 25(a). . . .
>
> "Thus, as stated by the Circuit Court of Appeals, Rule 25(a) operates *both as a statute of limitations upon revivor and as a mandate to the court to dismiss an action not revived within the two-year period.* . . .

> "Reasons of policy support this construction [that the time period of Rule 25(a) is not subject to enlargement by Rule 6(b)] . . . For the normal policy of a statute of limitations is to close the door —finally, not qualifiedly or conditionally. *The federal law embodied in Rule 25(a) has a direct impact on the probate of estates in the state courts. It should not be construed to be more disruptive of prompt and orderly probate administration in those courts than its language makes necessary.*"
>
> 329 U.S. 482, 485, 486 (Emphasis supplied)

Nothing that the Court said above involves jurisdiction. (See Point III B, *infra,* p. 45.)

All that the Court said was for the protection of the estate of the deceased defendant. This Court says, in effect, that the court below cannot waive the defendant's statute of limitations so as to delay settlement of the estate. None of these factors appear in the case at bar.

Nowhere does this Court say that the defendant cannot waive the statute of limitations or by its conduct be estopped from asserting it—as both lower courts found defendant did in the case at bar.

The estate of Birney Dysart is open for the purpose of adjusting the tax liabilities of this estate growing out of the pending litigation. To dismiss the claim involved and thereby force the administratrix d.b.n., c.t.a. to institute a new action against the defendant, would only delay settlement of the estate and both lower courts so found.

Plaintiff in *Yungkau* sought to continue his action against decedent by a revivor against the decedent's executor. He did not attempt to add the executor as a party defendant under Rule 21, and state a cause of action against him as executor. The statute of limitations governing the presentation of claims and suits *against* an executor would bar such a cause of action. In the present case,

however, the plaintiff-executrix was enforcing a claim on behalf of the Birney Dysart estate against Remington Rand. Under Connecticut law, this claim of the estate survived the death of the executrix and there is no time limit provided for the entry of a representative of the Birney Dysart estate, and hence Isabel D. Bush, administratrix d.b.n., c.t.a., could be added as a party plaintiff at any time before final judgment. (See p. 32, *infra*.)

Petitioner completely fails to distinguish between these two situations; one, an action *against* an estate and, the other, an action brought on behalf of an estate.

In *Yungkau* the executor, by invoking Rule 25(a)(1) and former 28 U.S.C. §778 (1940), rid himself for all time of the claim of the national bank receiver. Not only did the action abate but plaintiff's cause of action abated also. This is not so in the case at bar. As both lower courts have held, if action No. 3979 is dismissed, Isabel D. Bush, as administratrix d.b.n., c.t.a. of the estate of Birney Dysart, may forthwith institute a new action, either in the U. S. District Court or in the State Court, and under Connecticut law the action will be timely.

If the new action were brought in the District Court, the plaintiff could forthwith move for Summary Judgment pursuant to Rule 56(a) and this motion would be granted because of the absence of any genuine issue of material fact, relative to liability and the amount of damages in the light of the adjudications by both the District Court and Court of Appeals in this action. 6 Moore, pp. 2028, 2043, 2061.

Sec. 8332 (Conn. General Statutes—Rev. 1949) provides:

> "If any action, commenced within the time limited by law, shall have failed one or more times to be tried on its merits because of . . . or the action shall have been otherwise avoided or defeated by

> the death of a party; . . . his executor or administrator, may commence a new action for the same cause at any time within one year after the determination of the original action or after the reversal of the judgment . . ."

Sec. 8332 is remedial and subject to a liberal interpretation. *Johnston v. Sikes,* 56 Conn. 589 (1888); *Baker v. Baningoso,* 134 Conn. 382, 387 (1948).

Sections 7041 and 8339 (Conn. General Statutes—Rev. 1949) both provide that in case of the death of an executor or administrator, his successor in office may enter to prosecute or defend any pending action. No time limit is prescribed for the entry.

In the case at bar, the Courts did not exercise any discretion under Rule 6(b) to enlarge the time for substitution under Rule 25(a) (1). They did not violate the mandate of dismissal. Both lower Courts recognized that principle of *Yungkau.* They held, however, that the defendant by its prejudicial action could waive and had waived or was estopped to assert the time period of Rule 25(a) (1) which operates as "a statute of limitations." (See Point II B, *infra,* p. 36.)

The rendition of the interlocutory judgment prior to the death of Eva Perin Dysart and the full distribution of her estate *within* two years of her death, the presence of all the beneficial real parties in interest in the consolidated case, the delay of the defendant in raising the objection to the plaintiffs' prejudice and other related facts, clearly distinguish the case at bar from all of the lower court cases dealing with Rule 25 (a) (1), cited by Petitioner on page 11 of its petition.

The only other cases relied upon by Petitioner are two decisions of this Court dealing with an entirely different problem, to wit, the substitution of a federal official—

Snyder v. Buck (1950) 340 U. S. 15 and *United States ex rel Claussen v. Curran* (1927) 276 U. S. 590.

Both deal with Section 11(a) of the Judiciary Act of 1925, 43 Stat. 936, 941, substantially carried forward as Rule 25(d).

Snyder v. Buck was a mandamus action against a federal official, a naval paymaster, to compel him to pay the plaintiff-widow's allowance. After judgment in plaintiff's favor, the defendant ceased to be a paymaster and no substitution of his successor in office having been made within six months, as then required by both statute and Rule 25(d), the Court held that plaintiff's judgment must be vacated and she must start over.

In the *Snyder* case, the Court stated (340 U.S. at p. 18):

> "The complaint in this case makes no claim against [the naval paymaster] Buck personally . . . The writ that issued against Buck related to a duty attaching to the office. The duty existed so long and only so long as the office was held. When Buck retired from office, his power to perform ceased. He no longer had any authority over death gratuity allowances. Moreover, his successor might on demand recognize the claim asserted and discharge his duty. For these reasons it was held that in the absence of a statute an action aimed at compelling an official to discharge his official duties abated where the official died or retired from the office."

After pointing out that the Act of February 8, 1899 had changed the common law to provide for non-abatement of such actions on the federal official's death or separation from office, the Court continued (340 U.S. at pp. 19-20, 21-22): (Emphasis supplied)

> "The rule was again changed by Section 11 of

> the Judiciary Act of 1925. The provision that no action should abate was eliminated. It was provided that the action might be continued against the successor on the requisite showing within the stated period. The revision effected a substantial change. The 1925 Act made *survival* of the action dependent on a timely substitution. . . . This was a declared policy of Congress not to be altered by an agreement of the parties or by some theory of estoppel. . . . The inability of one who no longer holds the office to perform any of the official duties would indeed only be emphasized by the rendition of the coercive judgment. . . .
>
> "Nor is there any barrier to our review of this ruling on abatement by 28 U.S.C. § 2105 which prohibits a reversal by the Court of Appeals or this Court for error in ruling upon matters in abatement 'which do not involve jurisdiction.' The absence of a necessary party and the statutory barrier to substitution go to jurisdiction."

United States ex rel. Claussen v. Curran similarly held that a habeas corpus action abated where the respondent official resigned and his successor was not substituted within six months as required by Section 11 of the Judiciary Act of 1925.

These cases are readily distinguishable from the case at bar. In them, plaintiff's cause of action, as well as his suit, abated at common law when the federal official ceased to hold his office. Section 11 of the Judiciary Act of 1925 modified the common law by providing for a survival of the cause of action and the suit *only* if substitution was made against the successor officer within the statutory six months period. In other words, in those cases plaintiff's cause of action against one official survived and could be enforced against a different official only by vir-

tue of the federal statute and in accordance with its provisions.

In the case at bar, the survival of plaintiff's claim or cause of action against the defendant Remington Rand is not dependent upon federal law or upon substitution within any definite time. Under Connecticut law, the cause of action which was vested in the Birney Dysart estate survived the death of the executrix Eva Perin Dysart. (§ 8337 —Conn. Gen. Stat.—Rev. 1949, discussed *infra,* p. 39.) No Connecticut statute requires substitution to be made within a definite time in order for the cause of action to survive. And even if the present suit is abated, the cause of action is not abated. It survives. And a new action can be immediately brought and this action is not subject under Connecticut law to a defense of the statute of limitations. (See p. 31, *supra*)

There is also another important point of differentiation. In *Snyder v. Buck,* since substitution could be made only by virtue of the federal statute, and that statute barred substitution, there was an absence of a necessary party. Indeed, the new naval paymaster was an indispensable party, for only he could pay the claimed allowance.

In the case at bar, the plaintiff children, who were before the Court, became the beneficial real parties in interest within two years of Eva Perin Dysart's death and an administratrix d.b.n., c.t.a. has been added to take the bare legal title and liquidate the tax liabilities. There is no absence of a necessary or indispensable party. Indeed, all proper and necessary parties are before the Court. (See Point III D, *infra,* p. 46) And there is no statutory barrier to substitution. (See Point III C, *infra,* p. 46)

With all proper parties before the District Court, it would have been reversible error for it to refuse to proceed to judgment on the merits. *United States v. Allied Oil Corp.* (1950) 341 U.S. 1.

B. Petitioner has waived its right or is estopped to seek dismissal under the *Yungkau* doctrine.

As pointed out above, there is no statutory or jurisdictional barrier to action No. 3979 (Point II A, *supra;* and see Point III, *infra,* p. 44).

Under the *Yungkau* doctrine, Rule 25(a)(1) was likened to a "statute of limitations" which operated for the protection of the estate. But assuming arguendo that the *Yungkau* doctrine is to be perverted so that Rule 25(a)(1) is to be invoked against the estate and in favor of the defendant in a case where a defendant cannot rid itself of ultimate liability, elementary principles of law come into operation. A defendant can be estopped to assert a statute of limitations, *Lippitt v. Ashley,* 89 Conn. 451, 480 (1915). Similarly, a statute of limitations can be waived and petitioner so concedes. (Pet. p. 12)

District Judge Smith found (Petition, p. 44):

> "Defendant had knowledge of Mrs. Dysart's death early in 1946; at any time subsequent to December 30, 1947, two years after the date of death, it could have moved for dismissal pursuant to Rule 25(a)(1). The claim for dismissal was not raised, however, until defendant filed its original brief with the master, at which time lengthy and costly hearings had already been held. These hearings had started in January, 1949. If defendant had raised its claim for dismissal at that time and the motion to dismiss had been granted, the accountings would have been greatly simplified (or possibly if defendant's motion had been granted in full, rendered unnecessary) for only the interests of the three plaintiff children would have been involved. Instead the proceedings went forward on the apparent assumption that the right of recovery of the estates of Eva Perin and Birney Dysart was not questioned. Voluminous evidence

> which would have been irrelevant if the motion to dismiss had been seasonably pressed and granted, was introduced at great expense and effort to the plaintiffs. We agree with the master that by its acquiescence in allowing plaintiffs to put on full proofs, with no intimation that a claim for dismissal was going to be asserted, the defendant has procured a detrimental change in plaintiffs' position, has waived its right to have the action or any part of it dismissed under Rule 25 and is now estopped to seek dismissal."

The Second Circuit concurred (Petition, pp. 33, 34).

In view of the concurrent findings, this point of waiver and estoppel is not a proper subject for review by this Court.

Defendant's attempt to circumvent the doctrines of waiver and estoppel on the theory that Rule 25(a)(1) involves jurisdiction is answered in Point III, *infra*.

C. Petitioner's proposed application of *Yungkau* would render Rule 25(a) (1) invalid under the Rule-Making Statute and would deprive plaintiff of substantive rights under Connecticut law to which it is entitled by *Erie Railroad Co. v. Tompkins*.

Petitioner insists that dismissal is required by the "inexorable operation" of Rule 25(a) (1), which defendant cannot waive or be estopped to assert. (Petition, p. 15)

Yungkau was decided in 1947. And inasmuch as 28 U.S.C. §778 (1940) was not repealed until 1948, it was not necessary for the Court to determine whether Rule 25(a) (1), operating as "a statute of limitations," violated the Rule-Making Statute; or whether, in light of *Erie*, the Rule could be applied in a case involving State substantive rights where Rule 25(a)(1) and State law are in conflict. Petitioner's proposed application of Rule 25(a)

(1) renders the rule invalid under the Rule-Making Statute.

The statute of limitations involves a substantive right. *Guaranty Trust Co. v. York* (1945) 326 U.S. 99; *Ragan v. Merchants Transfer & Warehouse Co.* (1949) 337 U.S. 530. If then a Rule, such as 25(a)(1), has the operative effect of a statute of limitations, it violates the command of the Rule-Making Act (28 U.S.C. § 723(b) (1940), substantially carried forward as 28 U.S.C. § 2072) under which the Federal Rules were promulgated, that the "rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant." 4 Moore, pp. 505, 522.

This seems to be the present view of the Court's Advisory Committee, for in its note to its proposed amendment of Rule 25(a)(1), the Committee states (May, 1954 Draft, p. 19):

> ". . . It may be questioned whether a statute of limitation may be prescribed by rule of court. At the time of the *Anderson* [Yungkau] decision this question did not arise, because the 2-year provision of the rule was substantially identical with what was then 28 U.S.C. § 778, and the right involved in the action was a federal one. Even the statute was repealed by the Revision Act of 1948, . . . Thus the rule now stands as a statute of limitations without support in the statutes. . . ."

Furthermore, petitioner's proposed application of *Yungkau* violates the principle of *Erie* in the case at bar which involves State substantive rights. For, as noted above, a statute of limitations involves a substantive right. And it is elementary that a party may waive or be estopped to assert a statute of limitations, as the lower Courts found. (See Point II B, *supra,* p. 36) If, then, a statute of limitations which is subject to the doctrine of waiver and estoppel is substantive, *a fortiori* a kindred but "inexorable"

time period in a Rule which defendant cannot waive or be estopped to assert is substantive. And where, as here proposed by petitioner, it would defeat the enforcement of State substantive rights in violation of Connecticut law, the proposed application violates *Erie*. An "inexorable" time period, then, within which substitution must be made violates substantive rights where Connecticut law does not require a peremptory dismissal for failure to make substitution within a definite time period. 4 Moore, Pars. 25.06, 25.01, 25.04.

That a Federal Rule must give way in a diversity case, where its principles are substantive in nature and run counter to state law, is clear. Under *Erie* and *Guaranty Trust,* substantive law of Connecticut must be applied. A Federal Court cannot withhold that which a state gives. *Angel v. Bullington* (1947) 330 U.S. 183.

And under Connecticut law, the claim of the Dysart estate survived; and the action did not abate for failure to make substitution within any rigid time period.

Section 8337 of the Connecticut General Statutes (Rev. 1949) reads, in part, as follows:

> "No cause or right of action shall be lost or destroyed by the death of any person but it shall survive in favor of or against the executor or administrator of such deceased person. No civil action or proceeding shall abate by reason of the death of any party thereto, but it may be continued by or against the executor or administrator of such decedent. In case of the death of any party plaintiff, his executor or administrator may enter within six months thereafter and prosecute the suit in the same manner as his testator or intestate might have done if he had lived . . ."

This statute is both a survival statute and a non-abatement statute. The "non-abatement" feature of the statute

had its origin in a statute passed in 1753 (10 Colonial Records 207) and has been in effect in Connecticut ever since; the survival feature of this statute, has been in effect since 1848 (2 Locke & Kohn, Conn. Probate Practice, Secs. 453, 454).

The Connecticut Supreme Court has liberally construed this statute. *Hatch v. Boucher*, 77 Conn. 347 (1904), headnote states:

> "While the above statute [the predecessor of § 8337] gives an absolute right of entry within the time limited, it does not preclude the trial court, in the exercise of its discretion, from permitting the entry (of a party) at a later date for good cause shown."

This discretionary power to permit entry of an administrator after the six-months' period has been subsequently confirmed. *Craig v. Wagner*, 88 Conn. 100 (1914); *Clemens v. Harris*, 120 Conn. 111 (1935); *Dorsey v. Honeyman*, 141 Conn. 397 (1954). The Court has repeatedly looked through form and enforced the substantive rights of the parties. *Motiejaitis v. Johnson*, 117 Conn. 631 (1933).

Under Connecticut law, there is no loss of jurisdiction upon the late entry of a substituted party. *Clemens v. Harris*, 120 Conn. 111 (1935); *Bailey v. Mars*, 138 Conn. 593 (1952); *Dorsey v. Honeyman, supra.*

It is well settled law in Connecticut that upon the death of a person, the equitable title to personalty including choses in action *vests* in the legatees, distributees, or heirs-at-law, subject to being divested through payment of creditors, claims and administration expenses.

> "For almost one hundred years, this Court has recognized that the right in decedent's property, which is transmitted upon his death to his successor under the law, is a 'vested' right of this nature." *Parlato v. McCarthy*, 136 Conn. 126, 133 (1949).

And under the survivorship principle of Rule 25(a)(2) or the transfer principle of Rule 25(c), the District Court in the case at bar could have entered judgment for the three children in No. 3979 as holders of the beneficial title, since they were already parties in the consolidated action. *Miner v. Miner,* 137 Conn. 642 (1951).

The Court, however, added Isabel D. Bush, administratrix d.b.n., c.t.a. as a party plaintiff under Rule 21 and entered judgment in No. 3979 in her behalf.

This was not only proper; but with all the real parties in interest before the Court it would have been reversible error for the District Court to have done otherwise. *U. S. v. Allied Oil Corp.* (1950) 341 U. S. 1.

Petitioner's proposed application of Rule 25(a)(1) improperly applies the Rule to deal with substantive rights and in a manner that makes Connecticut law impotent.

D. Because the beneficial interest vested *within* two years of the death of the executrix, and because of other related facts, Rule 25(a) (1) must be construed in conjunction with other rules and principles; and so construed is correctly applied.

Rule 25(a)(1) cannot be read and applied in a vacuum, regardless of the facts and other Federal Rules and principles.

At the outset, Federal Rule 1 states the canon for construction:

> "They [the Federal Rules] shall be construed to secure the just, speedy, and inexpensive determination of every action."

Rule 61 commands the District Court at every stage of the proceedings to "disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

28 U.S.C. § 2111 states similar principles for review by this Court on certiorari; and 28 U.S.C. § 2105 forbids reversal on certiorari for error in ruling upon matters in abatement of a non-jurisdictional character. (See Point IV, *infra.*)

Moreover, as noted in Point II A, *supra,* it is surely folly to grant certiorari and apply Rule 25 (a) (1) in such a manner as to defeat the final judgment on the merits.

But substitution under Rule 25(a)(1) was unnecessary. Under Connecticut law, *within* two years of the death of the plaintiff-executrix the three plaintiff children became the only beneficial parties in interest to the claim of the Dysart estate against Remington Rand as that claim descended and passed by law from both the estates of Birney Dysart and Eva Perin Dysart and can descend and pass to no one else. As such beneficial real parties in interest, under Rule 17(a) they must be held to be the proper parties to prosecute the consolidated action. State law must be applied. *Thames v. State of Missouri,* 5th Cir., 117 F. (2d) 949, cert. denied 314 U.S. 630.

> "The beneficial owner therefore is not precluded from suing nor from joining with the legal title holder *if the beneficial owner has a right sought to be enforced.* Whether he has, as we have seen, will be determined by principles of substantive law." 3 Moore, Par. 17.12, p. 1370 (Emphasis supplied)

Accordingly, the case at bar is subject to the principle of Rule 25(c) dealing with the transfer of interest *pendente lite.* 4 Moore, Par. 25.08, p. 528. Or, it is within the survivorship policy of Rule 25(a)(2) which recognizes that on the death of one or more of the plaintiffs, where the surviving plaintiffs represent the complete interest in

the claim sued on, the death need only be suggested on the record, as it was (p. 11, *supra*); and the action *shall* proceed on behalf of the surviving plaintiffs. 4 Moore, Par. 25.06.

Petitioner argues that there was at one time a defect of parties—the absence of a representative of the Birney Dysart estate to represent the estate's legal title. But the defect, if any, was cured prior to judgment by the addition under Rule 21 of Isabel D. Bush, as administratrix d.b.n., c.t.a. for tax purposes; and Petitioner makes no claim that the defect or the addition of the party prejudiced it. Clearly, then, all parties, formal, necessary or indispensable, were before the District Court prior to the rendition of its final judgment. (See Point III D, *infra*, p. 46).

The cases have taken a most liberal approach to real parties in interest and the addition of a party, where no prejudice results, as here. See *Missouri, Kansas & Texas Railway Co. v. Wulf* (1913) 226 U.S. 570 (a person could be substituted in her capacity as a personal representative, even though she took out letters as personal representative after the action was commenced in her individual capacity); *Hackner v. Guaranty Trust Co.*, 2nd Cir. (1941) 117 F. (2d) 95, 98:

> "Defendants' claim that one cannot amend a non-existent action is purely formal. . . . Actually she [plaintiff] has a claim for relief . . . no formidable obstacle to a continuance of the suit appears here, whether *the matter is treated as one of amendment or of the power of the court to add or substitute parties, Federal Rule 21,* or of commencement of a new action . . . Rule 3. . . . this action can continue with respect to Eastman without the delay and expense of a new suit which will merely bring the parties to the point where they now are." (Emphasis supplied)

See also *Technical Tape Corp. v. Minnesota Mining & Mfg. Co.*, 2 Cir., 200 F. (2d) 876, 879, ("Forcing plaintiff to start over will not add to or subtract from these facts; it will only cause judicial waste."); 3 Moore, Par. 21.04, pp. 2907-2908.

POINT III

Actions No. 3978 and No. 3979

FAILURE TO MAKE SUBSTITUTION DOES NOT "DIVEST THE DISTRICT COURT OF JURISDICTION."

A. Rule 82 and this Court's decisions state that the Federal Rules do not affect jurisdiction.

Rule 82, ignored by Petitioner, states clearly that the Federal "rules shall not be construed to extend or limit the jurisdiction of the United States district courts."

The Advisory Committee in recommending, and the Court in promulgating, Rule 25(a)(1) in 1937 must have proceeded on the theory that Rule 25(a)(1) is not jurisdictional.

The Court has consistently adhered to the position that the Rules cannot be jurisdictional in character. *Sibbach v. Wilson & Co.* (1941) 312 U.S. 1, 10 stated:

> "There are other limitations upon the authority to prescribe rules which might have been but which were not mentioned in the [rule-making] Act; for instance, the inability of the Court by rule to extend or restrict the jurisdiction conferred by a statute."

And although a rule has general validity, such as Rule 20 dealing with permissive joinder of parties, it will not be applied to affect jurisdiction. *U.S. v. Sherwood* (1941) 312 U.S. 584. (A private defendant cannot be joined with

the United States in a contract action where this would violate the jurisdictional provisions of the Tucker Act).

And in 2 Moore, Par 1.04[1], p. 26, it is stated:

> ". . . The Supreme Court and its Advisory Committee have adhered to the self-imposed conditions that no rule should extend or limit the jurisdiction of the district courts or the venue of actions therein."

And the Advisory Committee presently considers Rule 25(a)(1) as in the nature of a statute of limitations and *not* jurisdictional. See Advisory Committee's Note in its May, 1954 Draft, p. 38, *supra.*

There was and is jurisdiction of these removed actions on the basis of diversity. Rule 25(a)(1) does not involve "jurisdiction of the subject matter" (Petition, p. 13) and hence Petitioner's contention that such jurisdiction is not subject to waiver or estoppel is wholly irrelevant to the facts of the case at bar.

B. *Anderson v. Yungkau* did not construe Rule 25(a)(1) as jurisdictional.

Relying upon the Court's statement in *Yungkau* that the Rule operates "as a mandate to the Court to dismiss", Petitioner asks this Court to construe *Yungkau* as making Rule 25(a)(1) jurisdictional, so that a failure to comply therewith "divest[s] the District Court of jurisdiction". (Petition, pp. 2, 10, etc.) As previously pointed out (see Point II A, *supra,* p. 29) the Court in Yungkau was dealing with a reconciliation of Rule 25(a)(1), and Rule 6(b) on the enlargement of time, in a case involving a *federal* matter. It held Rule 25(a)(1) to operate as a statute of limitations for the protection of a defendant estate; and that the District Court could not in its discretion enlarge that time period under Rule 6(b). In

other words, the District Court did not have discretionary power to turn a "statute of limitations" into a doctrine of laches. This Court, in *Yungkau,* in keeping with the mandate of Rule 82, did not give any jurisdictional effect to Rule 25(a)(1).

C. 28 U.S.C. § 778 (1940), dealing with failure to make substitution, was repealed in 1948.

Yungkau was decided in 1947. 28 U.S.C. § 778 (1940) was repealed in 1948 by the Judicial Code. H. Rep. No. 308, 80th Congress, 1st Session, A239 (1947); 4 Moore, Par. 25.01 [4], [7].

Whatever statutory barrier to substitution there may have been, exists no longer. There is no congressional policy requiring a dismissal of either action No. 3978 or No. 3979.

D. All necessary or indispensable parties are before the Court.

In Action No. 3978, there was no problem of substitution. (See Point I A, *supra.*)

Upon Eva Perin Dysart's death, the plaintiff children became the beneficial real parties in interest in No. 3979, were before the Court in the consolidated case, and no substitution for Eva Perin Dysart, as executrix, was necessary. One of the plaintiff children was added as administratrix d.b.n., c.t.a. to liquidate the tax liability of the Birney Dysart estate. (See Point II B, C, *supra.*)

Thus, whether she be regarded as a formal, proper, necessary or indispensable party, once she was joined the action could not be dismissed. *Greenleaf v. Safetrails, Inc.,* 2 Cir., 140 F. (2d) 889; *Keene v. Hale-Halsell Co.,* 5 Cir., 118 F. (2d) 332, 335; 3 Moore, Pars. 19.07, 19.08, 19.10, 19.19, 21.04.

No necessary or indispensable party was absent which

required a dismissal as in *Snyder v. Buck; United States ex rel. Claussen v. Curran.* (See Point II A, *supra.*)

With all the proper, necessary or indispensable parties before the Court, it would have been reversible error for the District Court to have dismissed either action No. 3978 or No. 3979. *U.S. v. Allied Oil Corp.* (1950) 341 U.S. 1.

POINT IV

Actions No. 3978 and No. 3979

THIS COURT IS PRECLUDED FROM REVERSING EITHER JUDGMENT.

A. 28 U.S.C. § 2111 and related principles of harmless error forbid reversal.

Failure, if any, to comply with Rule 25(a)(1) did not divest the District Court of jurisdiction. (See Point III, *supra.*)

Rule 61 on harmless error states that the District Court "must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties". And 28 U.S.C. § 2111 commands that

> "On the hearing of any appeal or writ of certiorari in any case, the Court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

The very purpose of this statute is to prevent judgments on the merits from being reversed for some omission, such as the failure to make an unnecessary substitution, as here, where all the real parties in interest were and are before the Court.

Since Petitioner does not contend that it was preju-

diced by the alleged error, then certainly the error, if any, was harmless.

B. Petitioner has no valid interest or concern as to how the proceeds of recovery against it shall be divided.

The discussion on this point under Point I C (4) applies equally to action No. 3979.

C. Judgment nunc pro tunc could have been entered as of a time subsequent to the interlocutory judgment of July 18, 1941, and prior to Eva Perin Dysart's death on December 30, 1945 to prevent a failure of justice where the delay was attributable to defendant's wrong.

An interlocutory judgment adjudging the defendant liable and ordering it to account was rendered by the District Court on July 18, 1941. This was approximately 4½ years prior to the death of Eva Perin Dysart, who died, on December 30, 1945, during the pendency of the long accounting proceedings necessitated by the defendant's wrongful failure to perform its contract.

The cases have taken a remedial and practical approach in similar situations by ordering the entry of a judgment nunc pro tunc in order to prevent a failure of justice where the delay is not attributable to the deceased party, or is attributable to the wrong of the adverse party. *Mitchell v. Overman* (1880) 103 U.S. 62, 64-65; *Harris v. C.I.R.* (1950) 340 U.S. 106; 6 Moore, Par. 58.08.

Hennessy v. Denihan (1930) 110 Conn. 646, states at pp. 648, 649:

> "Had the Court known of his death it could still have entered its decree *nunc pro tunc,* dating it back to a day subsequent to the hearing and prior to the date of his death. . . . His death did not de-

> prive the Court of jurisdiction and the judgment thereafter rendered was merely irregular."

A judgment nunc pro tunc in action No. 3979 could have been entered in the amount awarded Isabel D. Bush as administratrix d.b.n., c.t.a. and the defendant would not have been prejudiced a single penny.

The District Court, in lieu of entering a judgment nunc pro tunc, added Isabel D. Bush administratrix d.b.n., c.t.a. as party-plaintiff in action No. 3979 under Rule 21. The Second Circuit affirmed. No prejudicial error has been asserted by Petitioner. If we assume, arguendo, that the District Court erred, the error was harmless.

D. 28 U.S.C. § 2105 forbids a reversal for error in ruling upon non-jurisdictional matters of abatement.

As pointed out *supra* (p. 47), error, if any, was harmless. At most, it involved matter in abatement and not in bar, for defendant cannot rid itself of its ultimate liability. (See Point II A, *supra.*)

In *Snyder v. Buck,* the absence of and impossibility of adding a necessary or indispensable party deprived the Court of power or jurisdiction to proceed. In the case at bar, however, all formal, proper, necessary and indispensable parties were before the Court. Under these circumstances, the Court had the power or jurisdiction to proceed. (See Point III D, *supra.*) Hence, if the District Court's refusal to abate either action was error, it was harmless and did not involve jurisdiction.

Under these circumstances, 28 U.S.C. § 2105 applies. It states:

> "There shall be no reversal in the Supreme Court or a Court of Appeals for error in ruling upon matters in abatement which do not involve jurisdiction."

CONCLUSION

It is respectfully submitted that the Petition presents no jurisdictional or other error for review. The Second Circuit correctly followed and applied *Anderson v. Yungkau* to the facts of these cases and correctly construed and applied the applicable Federal Rules and statutes.

There is no question for review in action No. 3978.

There is no matter of substance for review in action No. 3979. If there was any failure to observe all procedural niceties in this action, it was harmless procedural error involving matter in abatement of a non-jurisdictional character.

The judgments have accorded the plaintiffs the rights to which they are entitled under Connecticut substantive law. Judicial economy demands that after 17 years, the plaintiffs be permitted to enjoy the fruits of their judgments.

Respondents, therefore, respectfully request this Court to deny the Petition for Certiorari in both actions No. 3978 and No. 3979.

Dated: Hartford, Connecticut, September 28, 1954.

Respectfully submitted,

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APPENDIX

Federal Rules of Civil Procedure

"*Rule 1. Scope of Rules.* These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action."

Connecticut General Statutes (Rev. 1949)

"*Sec. 8332. Accidental failure of suit; when new action is allowable.* If any action, commenced within the time limited by law, shall have failed one or more times to be tried on its merits because of insufficient service or return of the writ due to unavoidable accident or the default or neglect of the officer to whom it was committed, or because the writ was abated, or shall have been erased from the docket for want of jurisdiction, or the action shall have been otherwise avoided or defeated by the death of a party or for any matter of form; or, if, in any such action after a verdict for the plaintiff, the judgment shall have been arrested, or, if a judgment of nonsuit shall have been rendered or a judgment for the plaintiff reversed, the plaintiff, or, if the plaintiff be dead and the action by law survive, his executor or administrator, may commence a new action for the same cause at any time within one year after the determination of the original action or after the reversal of the judgment. When any action shall have been brought against an executor or administrator or continued against an executor or administrator after the death of the defendant and shall have failed for any of the causes above mentioned, the plaintiff, or his executor or administrator in case a cause of action shall survive, may commence a new action within six months after such determination of the former

one. If an appeal be had from any such judgment to the supreme court of errors, the time such case is pending upon such appeal shall be excluded in computing the time as above limited. The provisions of this section shall apply to any defendant who shall file a cross-complaint in any action, and to any action between the same parties or the legal representatives of either of them for the same cause of action or subject of action brought to any court in this state, either before dismissal of the original action and its affirmance or within one year after such dismissal and affirmance, and to any action brought to the United States circuit or district court for the district of Connecticut which shall have been dismissed without trial upon its merits or because of lack of jurisdiction in such court, and, in case such action shall be within the jurisdiction of any state court, the time for bringing such action to such state court shall commence from the date of such dismissal in the United States court, or, if an appeal or writ of error shall have been taken from such dismissal, from the final determination of such appeal or such writ of error."

"*Sec. 8337. Survival of actions and causes of actions.* No cause or right of action shall be lost or destroyed by the death of any person, but it shall survive in favor of or against the executor or administrator of such deceased person. No civil action or proceeding shall abate by reason of the death of any party thereto, but it may be continued by or against the executor or administrator of such decedent. In case of the death of any party plaintiff, his executor or administrator may enter within six months thereafter and prosecute the suit in the same manner as his testator or intestate might have done if he had lived; and, in case of the death of any party defendant, the plaintiff, within one year thereafter, may have a writ of scire facias against such decedent's executor or administrator to show cause why judgment should not be rendered against

him, which shall be served at least twelve days before the day upon which it is returnable, and upon its return the action may proceed. The provisions of this section shall not apply to any cause or right of action or to any civil action or proceeding the purpose or object of which is defeated or rendered useless by the death of any party thereto; nor to any civil action or proceeding whose prosecution or defense shall depend upon the continued existence of the persons who are plaintiffs or defendants; nor to any civil action upon a penal statute."

"Sec. 7041. Removal, resignation or death of fiduciary, and appointment of successor. When any executor or administrator or any other person acting in a fiduciary capacity shall become incapable of executing his trust, or neglect to perform the duties thereof, or waste the estate in his charge, the court of probate having jurisdiction may remove him, after notice and a hearing, on its own motion, or upon the application and complaint of any person interested or of the surety upon his probate bond, and such court, after notice and hearing, may act upon and accept or reject the written resignation of any such person; but no such resignation shall be accepted until such person shall have fully and finally accounted for the administration of his trust to the acceptance of such court. Upon the death, removal or acceptance of the resignation of any such person before the completion of his duties, such court of probate may appoint a suitable person to fill the vacancy caused thereby, who shall give a probate bond, and all suits in favor of or against any such person shall survive to and may be prosecuted by or against the person appointed to succeed him. Trustees appointed by a testator to execute a trust created by will and testamentary guardians may resign or be removed, and the vacancies filled in like manner by the court having jurisdiction, unless otherwise provided by the will."